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To See or Not To See: Television, Capital Punishment, and Law's Violence

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Wendy Lesser, *Pictures at an Execution: An Inquiry into the Subject of Murder*. Cambridge: Harvard University Press, 1993. Pp. viii, 270. $24.95

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"Punishment . . . (has) become the most hidden part of the penal process. . . . We are far removed indeed from . . . accounts of the life and misdeeds of the criminal in which he admitted his crimes, and which recounted in detail the tortures of his execution. . . . It is ugly to be punishable, but there is no glory in punishing. Hence . . . [t]hose who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself."

Michel Foucault, *Discipline and Punish*

"There is a difference between real and fictional murder, between murder and execution, between innocence and guilt. It may be a sign of humility and fellow-feeling to argue the fuzziness of the boundaries in each case, but it is no service to justice or to the innocent to erase them altogether."

Wendy Steiner, "We Are All Murderers Now"

"Because in capital punishment the action or deed is extreme and irrevocable, there is pressure placed on the word—the interpretation that establishes the legal justification for the act. At the same time, the fact that capital punishment constitutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence makes the imposition of the sentence an especially powerful test of the faith and commitment of the

* We are grateful for helpful comments provided by Lawrence Douglas, Thomas Dumm, and Richard Moran.

interpreters. . . . Capital cases, thus, disclose far more of the structure of judicial interpretation than do other cases."

Robert Cover, "Violence and the Word"

"Television's principal compulsion and major attraction comes to us as the relation to law. As that which is thematized compulsively, the relation to law is at once there and not there. . . . This relation to law which television compulsively repeats as its theme is simultaneously presented as the unthematizable par excellence. . . ."

Avital Ronell, *Finitude's Score*

"Television can . . . be understood as the popular vehicle for the democratization of Nietzsche's knowledge concerning the death of God."

Thomas Dumm, *united states*

I. INTRODUCTION

Last year thirty-one people were executed in the United States. One was gassed, six were electrocuted, one was hanged; the rest were put to death by lethal injection.[1] While all other constitutional democracies have abandoned capital punishment, the United States tenaciously clings to it.[2] We use the death penalty as retribution, but also, as Michel Foucault reminds us, to respond to affronts to our legal regime itself.[3] However, particularly in a constitutional

1. These figures were provided by the National Coalition to Abolish the Death Penalty.

2. See Franklin Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge: Cambridge Univ. Press, 1986).

3. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1977). Foucault writes that "Besides its immediate victim, the crime attacks the sovereign: it attacks him personally, since the law represents the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince. . . . Punishment, therefore, cannot be identified with or even measured by the redress of injury; in punishment, there must always be a portion that belongs to the prince, and, even when it is combined with the redress laid down, it constitutes the most important element in the penal liquidation of the crime." Ibid., 47-48.

Along with the right to make war, the death penalty is, in some accounts, the ultimate measure of sovereignty and the ultimate test of political power. See Elaine Scarry, "The Declaration of War: Constitutional and Unconstitutional Violence," in *Law's Violence*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: Univ. of Michigan Press, 1992). "Political power," John Locke wrote, "[is] the right of making laws with penalties of death . . . ." John Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill, 1952), [chap. 1, #2, p. 4]. Others note that "the state's power deliberately to destroy innocuous (though guilty) life is a manifestation of the hidden wish that the state be allowed to do anything it pleases with life." George Kateb, *The Inner Ocean* (Ithaca: Cornell Univ. Press, 1992), 192.

democracy, the deliberate taking of life as an instrument of state policy is an enormous evil.[4] A death penalty democratically administered implicates us all as agents of law's violence. An execution, as Wendy Lesser argues in *Pictures at an Execution: An Inquiry into the Subject of Murder*, is "a killing carried out in all our names, an act of the state in which we by proxy participate, it is also the only form of murder that directly implicates even the witness, the bystanders."[5]

The fact that the state takes life and the way in which it takes life insinuate themselves into the public imagination, even as the final moments of executions are hidden from public view. This particular exercise of power helps us understand who we are and what we as a society are capable of doing. As Lesser skillfully documents, the largely, though incompletely, hidden moment when the state takes life precipitates, in an age of the hypervisual, a crisis of representation.[6]

Historically executions were, in Foucault's words, "[m]ore than an act of justice"; they were a "manifestation of force."[7] Executions always have been centrally about *display*—in particular the display of the awesome power of sovereignty as it was materialized on the body of the condemned.[8] Public executions functioned as public theater

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4. Robert Burt has recently suggested that "[t]he retaliatory force justified by the criminal law . . . has the same place in democratic theory as majority rule. Each is a form of coercion and neither is legitimate as such. Criminal law penalties and majority rule are both rough equivalents, tolerably consistent with the democratic equality principle only if all disputants (but most particularly, the dominant party) see their application of defensive coercion as a limited way station working ultimately toward the goal of a consensual relationship among acknowledged equals." Robert Burt, "Democracy, Equality and the Death Penalty," *Nomos* 36 (1994): 14.

"The death penalty," as Terry Aladjem writes, "strains an unspoken premise of the democratic state," that may variously be named "respect for the equal moral worth" or "equal dignity of all persons". Terry Aladjem, "Revenge and Consent: Lockean Principles of Democracy," (manuscript, 1990), 2. See also A. I. Meldren, "Dignity, Worth, and Rights," in *The Constitution of Rights*, ed. Michael Meyer and William Parent (Ithaca: Cornell Univ. Press, 1992), and Jordan Paust, "Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content," *Howard Law Journal* 27 (1984): 150. Democratically administered capital punishment, punishment in which citizens act in an official capacity to approve the deliberate killing of other citizens, contradicts and diminishes the respect for the worth or dignity of all persons that is the enlivening value of democratic politics. See Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 270 (1972), and Hugo Adam Bedau, "The Eighth Amendment, Dignity, and the Death Penalty," in Meyer and Parent, eds., The Constitution of Rights.

5. Wendy Lesser, *Pictures at an Execution: An Inquiry into the Subject of Murder* (Cambridge: Harvard Univ. Press, 1993), 4.

6. "[T]he struggle over the *representation* of politics in the public spheres of late twentieth-century America has become the single most important force shaping political life in this country." Frederick Dolan and Thomas Dumm, "Introduction: Inventing America," in *The Rhetorical Republic: Governing Representations in American Politics*, ed. Frederick Dolan and Thomas Dumm (Amherst: Univ. of Massachusetts Press, 1993), 1.

7. Foucault, *Discipline and Punish*, 50.

8. The right to dispose of human life through sovereign acts was traditionally thought to be a direct extension of the personal power of kings. See Foucault, *Discipline and Punish*, 9; Roger Caillois, "The Sociology of the Executioner," in *The College of Sociology (1937-39)*, ed. Denis

and as a school for citizenship.[9] In Foucault's account, execution produced a drama of death in which the public attempted to learn the meaning of death as it unfolded,[10] and it also contained a pedagogy of power. The display of violence was designed to create fearful and obedient subjects. Without a public audience, execution was meaningless. "Not only must the people know," Foucault suggests, "they must see with their own eyes. Because they must be made to be afraid, but also because they must be witnesses, the guarantors of the punishment, and because they must to a certain extent take part in it."[11] In this understanding of the relationship of punishment and the people, "the role of the people was an ambiguous one."[12] They were simultaneously fearful subjects, authorizing witnesses, and critical participants.

Yet the public execution was also an occasion for the exercise of popular power.[13] It was an occasion on which people could, and did, mass themselves against the punishment which was to be carried out before their eyes.[14] As a result, public participation was often unruly. The excesses of execution and the response of the attending crowd blended the performance of torture with pleasure, creating an unembarrassed celebration of violence.[15]

Hollier, trans. Betsy Wing (Minneapolis: Univ. of Minnesota Press, 1988), 247. Yet with the transition from monarchical to democratic regimes, some theorists argued that the maintenance of capital punishment was essential to the demonstration that sovereignty could reside in the people. For such theorists, like Locke, if the sovereignty of the people was to be genuine, it had to mimic the sovereign power and prerogatives of monarchy. Rather than seeing the true task of constitutional democracy as the transformation of sovereignty and its prerogatives in the hope of reconciling them with a commitment to respecting the dignity of all persons, the death penalty has been miraculously transformed from an instrument of political terror used by "them" against "us," to our instrument wielded consensually by some of us against others. Thus the most extreme punishment has become a key to understanding modern mechanisms of consent. Aladjem, "Revenge and Consent." See also Thomas Dumm, *Democracy and Punishment: Disciplinary Origins of the United States* (Madison: Univ. of Wisconsin Press, 1987).

9. See Petrus Spierenburg, *The Spectacle of Suffering* (Cambridge: Cambridge Univ. Press, 1984).

10. Foucault, *Discipline and Punish*, 46.

11. Ibid., 58.

12. Ibid.

13. In Foucault's words, "In the ceremonies of the public execution, the main character was the people . . . ." Ibid., 57.

14. David Cooper, *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England* (Athens: Ohio Univ. Press, 1974).

15. See V. A. C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (New York: Oxford Univ. Press, 1994), chap. 2.

In addition, the public's presence insured that the act of execution itself, not just the judgment of death, always could be contested.[16] The system of public execution, Thomas Dumm suggests,

> engenders its own vulnerability, and this vulnerability was to be crucial to the eventual migration of sovereignty from the body of the King to the law. An important point of that vulnerability is the fact that the execution of punishment occurred as spectacle, which always contains a latent disorder threatening to break out, an always latent possibility of the loss of control by the agents of sovereign authority.[17]

Thus the question of the presence of the public is always, as we shall argue in this Essay, a question of control, of who will be in charge at the moment when the state's death-imposing power is deployed.

Today the death penalty has been transformed from dramatic spectacle to cool, bureaucratic operation. The role of the public is strictly limited, and control is firmly vested in the state's bureaucratic officials. The chance for disruption or rejection has been minimized. The modern execution, carried out behind prison walls, is a hidden, sacrificial ceremony in which a few selected witnesses are gathered in a carefully controlled situation to see (and, in their seeing, to sanctify) the state's taking of life.[18]

Capital punishment has become, for most of us, a hidden reality, known by indirection. As Hugo Bedau puts it, "The relative privacy of executions nowadays (even photographs of the condemned man dying are almost invariably strictly prohibited) means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a

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16. As Gatrell argues, "These crowds behaved and spoke in terms which polite observers grew less able to understand. Many crowds acquiesced in what was done by the law and affirmed its righteousness. The hanging of murderers was usually approved. But when humbler people hanged for humble crimes, they could act like a Greek chorus, mocking justice's pretensions." Ibid., 59.

17. Thomas Dumm, "Disciplinary Society," (manuscript, 1995), 101.

18. As Robert Johnson suggests,

> In the modern period (from 1800 on), ceremony gradually gave way to bureaucratic procedure played out behind prison walls, in isolation from the community. Feelings are absent, or at least suppressed, in bureaucratically administered executions. With bureaucratic procedure, there is a functional routine dominated by hierarchy and task. Officials perform mechanistically before a small, silent gathering of authorized witnesses.

Robert Johnson, *Death Work: A Study of the Modern Execution Process* (Pacific Grove, CA: Brooks/Cole Publishing, 1990), 5. Richard Moran notes, "The execution ceremony has changed much over the years. In a way it has become less humane. A detached, private kindness has replaced unrestrained public brutality." Richard Moran, "Invitation to an Execution: Death by Needle Isn't Easy," *Los Angeles Times*, 24 March 1985. See also Susan Blaustein, "Witness to Another Execution," *Harper's Magazine*, May 1994, 53; and Richard Trombley, *The Execution Protocol: Inside America's Capital Punishment Industry* (New York: Crown Publishers, 1992).

criminal."[19] What we know about the way law administers death comes in the most highly mediated way as a rumor, a report, an account of the voiceless expression of the body of the condemned.[20] The public has been displaced by the witnesses, a small, select, and carefully controlled group, who are provided with a fleeting glimpse of the rituals of state-sponsored death as it is turned into a problem of administration.[21] The state's power to kill is thus linked to the imperatives and privileges of witnessing. The problem of spectatorship and the public's role remains. It is this linkage between violence and the visual that *Pictures at an Execution* explores.

Because the state has dismantled the scaffold and banned executions in public places, for most people the death penalty exists, as Lesser's book demonstrates, only as a symbolically represented practice. Newspaper accounts and television news reports, as well as courtroom narratives, all attempt to describe, to show, and to put into discourse the act of execution.[22] But still questions persist: How widely shared should the privilege of witnessing and viewing be? What limits should there be on its representation? Should executions be televised? What would it mean for us and for our culture were citizens routinely turned into viewers of capital punishment?

These questions provide the frame for Lesser's book, an impressive and interesting rumination on murder (including execution) and its

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19. Hugo Adam Bedau, *The Death Penalty in America* (New York: Oxford Univ. Press, 1982), 13.

20. A recent story about the execution of Robert Alton Harris reported that "[a]ccording to several witnesses Mr. Harris appeared to lose consciousness after about one and one-half minutes although his body continued a series of convulsive movements and his head jerked backward several times." *New York Times*, 22 April 1992. See also Austin Sarat and Neil Vidmar, "Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis," *Wisconsin Law Review* 171 (1976): 199-200; Johnson, *Death Work*, chap. 7.

21. As Lesser reminds us in a discussion of a California statute requiring there to be twelve citizen witnesses at every execution, "[T]hey are there not just to ensure that the deed is actually done . . . , but to represent and embody the wider public in whose name the execution is being carried out." Lesser, 37.

22. While execution itself is effectively hidden from public view, the spectacle of law's dealings in death may be (re)located and made visible in capital trials. See Craig Haney, Lorelei Sontag, and Sally Costanzo, "Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death," *Journal of Social Issues* 50 (1994): 149. See also Austin Sarat, "Speaking of Death: Narratives of Violence in Capital Trials," *Law & Society Review* 27 (1993): 20. Indeed, capital cases—the trial and the repeated appeals—have displaced execution itself as the venue for the display of sovereignty. Under the force of this relocation we focus on the case rather than the body of the "condemned." As Foucault puts it, "publicity has shifted to the trial, and to the sentence; the execution itself is like an additional shame that justice is ashamed to impose on the condemned man . . . ." This has several consequences:

> [Punishment] leaves the domain of more or less everyday perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity; it is the certainty of being punished and not the horrifying spectacle of public punishment that must discourage crime. . . . As a result, justice no longer takes public responsibility for the violence that is bound up with its practice.

Foucault, *Discipline and Punish*, 9.

representation. Like Moussorgsky's "Pictures at an Exhibition," Lesser's book proceeds as a pastiche of readings, impressions, and suggestions rather than as a linear argument. It roams expansively to examine murder in canonical works of literature, detective fiction, popular culture, and film. In so doing, it explores the "increasingly blurry borderline between real murder and fictional murder, between murder as news and murder as art, between event and story."[23] For the most part, *Pictures at an Execution* is convincing in its readings and interpretations, as well as engaging in its coverage of such staples as *Crime and Punishment* and *Macbeth*, and a wide range of lesser known novels, plays, and mystery stories.

The thread which runs throughout the book is Lesser's ongoing examination of a single case, *KQED v. Vasquez*,[24] in which the question of televising an execution was subject to juridical determination. In this case, KQED, a public television station in San Francisco, sought permission to film and televise the execution, by lethal gas, of Robert Alton Harris. It claimed a First Amendment right both to cover the execution and to use the "tools of its trade"—in particular, video equipment. While KQED ultimately lost its lawsuit, Lesser uses this case to explore murder and capital punishment and to examine why our culture is so preoccupied with both. She uses the case to develop an argument about capital punishment and to think about "the crucial connection between murder and theater—between death imposed on a human being by another human being and dramatic spectacle."[25] For Lesser, KQED's case is an occasion for analyzing "execution and its real or potential witnesses" and for helping us "to understand why and how we identify with the various participants in a murder story."[26]

In the course of her analysis, Lesser makes two arguments that we examine in this Essay. First, she announces her opposition to capital punishment by boldly comparing it to murder. Second, she argues that executions should not be televised, that it would be indecent and voyeuristic to do so. In Part II, we argue that the equation of capital punishment with murder, while it productively unsettles the boundaries between legal and extra-legal violence, misses the more important harm of capital punishment—namely, the damage it does to law. In Part III, we take up Lesser's opposition to televising executions and suggest that in contrast to her concerns for what we call the "manners of viewing," the problem of televising executions

23. Lesser, 1.
24. No. C-90-1383 RHS, 1991 U.S. Dist. LEXIS 19791 (N.D. Cal 1991).
25. Lesser, 7.
26. Ibid., 8.

must be addressed in a more overtly political way. We suggest that the survival of capital punishment in the modern economy of power depends on its relative invisibility. In both of these responses to Lesser, we acknowledge the refreshing and interesting ways *Pictures at an Execution* helps to frame the debate about television, capital punishment, and law's violence.

II. Is Execution Murder?

At an early point in her book, Lesser flatly states her opposition to capital punishment: "I do not approve of the death penalty."[27] As Lesser explains her opposition, she seeks, in the tradition of Camus, Turgenev, and Foucault, to blur the distinction between capital punishment and crime.[28] Execution, Lesser says, "shares enough of the characteristics of murder to be counted as part of the general category: it includes a victim who does not want to die, and an agent that nonetheless kills him."[29] She is repelled by the idea that the state can be justified in taking the lives of its citizens in such a wanton and premeditated fashion. Moreover, she rejects the argument that execution can be justified in light of the heinous acts of the murderer. As she puts it, "while the convicted murderer may not be an innocent victim, her murderousness in itself does not prevent her from being the victim of a full-fledged murder."[30]

In her claim that execution is a form of murder, Lesser raises a central issue in the contemporary debate about capital punishment and in contemporary legal theory: How, if at all, does the violence of law differ from the violence to which law is opposed?[31] For many, this question will seem to answer itself. Law's violence is, after all, legal. What more is there to say? But for those who confront law's violence at the end of a police baton, in the vivid images of the tape-recorded beating of Rodney King, or in the increasingly frequent reports of the death of yet another victim of America's vestigial attachment to capital punishment, this question will be direct, immediate, and painful.[32] For them, this question demands an answer.

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27. Ibid., 7.

28. Albert Camus and Arthur Koestler, *Réflexions sur la peine Capitale* (Paris: Calmann-Levy, 1957); Ivan Turgenev, *Literary Reminiscences and Autobiographical Fragments*, trans. Davis Magarshack (New York: Farrar, Strauss, 1958), chap. 8; Foucault, *Discipline and Punish*.

29. Lesser, 5.

30. Ibid., 7.

31. See Austin Sarat and Thomas Kearns, "A Journey Through Forgetting: Toward a Jurisprudence of Violence," in *The Fate of Law*, ed. Austin Sarat and Thomas Kearns (Ann Arbor: Univ. of Michigan Press, 1991).

32. As Derrida puts it,

> "Applicability," "Enforceability" is not an exterior or secondary possibility that may or may not be added as a supplement to law. . . . The word "enforceability" reminds us that

Ever since Robert Cover wrote the now well-known sentence, "Legal interpretation plays on a field of pain and death," legal scholars have increasingly turned their attention to violence as a pervasive fact of legal life.[33] They have attempted to chart the role of violence in law and its impact on law, and to examine the differences between law's violence and violence outside the law. The uneasy linkage between law and violence is now widely recognized, yet the ways that law manages to "work its lethal will, to impose pain and death while remaining aloof and unstained by the deeds themselves, is still an unexplored and hardly noticed mystery in the life of the law."[34] As pervasive as is the relationship of law and violence, *Pictures at an Execution*, in its careful exploration of the similarities between capital punishment and murder, provides a powerful reminder of the difficulty of speaking about the relationship between law and violence.[35]

This difficulty arises because law is violent in numerous ways—in the ways it uses language and in its representational practices,[36] in the silencing of perspectives and the denial of experience,[37] and in

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there is no such thing as law that doesn't imply in itself, *a priori*, . . . the possibility of being "enforced," applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic.

Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* 11 (1990): 925.

33. See Sarat and Kearns, "A Journey Through Forgetting," and Anthony Alfieri, "The Ethics of Violence: Necessity, Excess, and Opposition," *Columbia Law Review* 94 (1994): 1721.

34. Sarat and Kearns, "A Journey Through Forgetting," 211.

35. As Ronald Dworkin argues,

Day in and day out we send people to jail, or take money away from them, or make them do things they do not want to do, under coercion of force, and we justify all this by speaking of such persons as having broken the law or having failed to meet their legal obligations. . . . Even . . . when we are confident that someone had a legal obligation and broke it, we are not able to give a satisfactory account of what that means or why it entitles the state to punish or coerce him. We may feel confident that what we are doing is proper, but until we can identify the principles we are following we cannot be sure they are sufficient. . . . In less clear cases . . . the pitch of these nagging questions rises, and our responsibility to find answers deepens.

Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard Univ. Press, 1977), 15.

Another version of this difficulty is described by Samuel Weber: "To render impure, literally; to 'touch with' (something foreign, alien), is also to violate. And to violate something is to do violence to it. Inversely, it is difficult to conceive of violence without violation, so much so that the latter might well be a criterion of the former: no violence without violation, hence, no violence without a certain contamination." Samuel Weber, "Deconstruction Before the Name: Some [Very] Preliminary Remarks on Deconstruction and Violence," (manuscript, 1990), 2.

36. See Catharine MacKinnon, *Feminism Unmodified* (Cambridge: Harvard Univ. Press, 1987).

37. See Martha Minow, *Making All the Difference* (Ithaca: Cornell Univ. Press, 1989). See also Joan Scott, "The Evidence of Experience," *Critical Inquiry* 17 (1991): 773; Teresa de Lauretis, "The Violence of Rhetoric: Considerations on Representation and Gender," in *The Violence of Representation*, ed. Nancy Armstrong and Leonard Tennenhouse (London: Routledge, 1989).

its objectifying epistemology.[38] The linguistic, representational violence of the law is inseparable from its literal, physical violence.[39] And violence, as both a linguistic and physical phenomena, as fact and metaphor,[40] is integral to the constitution of modern law.[41] Law is thus built on representations of aggression, force, and disruption.[42] By focusing on these representations and on the murderous deeds of law itself, Lesser's book informs us of the ways that law implicates all of us as participants and spectators.

Lesser's notion that we are both fascinated and repelled by murder and its representation is reminiscent of Elaine Scarry's powerful arguments about the difficulty of representing pain.[43] "We feel in regard to our murderers," Lesser notes, "more sympathy, more identification, than most of us can easily admit; and therefore we rely on art to admit it for us."[44] At the same time, murder and death are inherently frustrating because they keep "moving away from us, evading us. We want to ask big questions; more than anything else, we want to get *answers* to the big questions," but "one can never get at the thing itself."[45] For Lesser, murder and death are physical facts and metaphysical realities that exist beyond language and represen-

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38. Robin West, "Disciplines, Subjectivity, and Law," in Sarat and Kearns, eds., *The Fate of Law*.

39. See Peter Fitzpatrick, "Violence and Legal Subjection," (manuscript, 1993), 1:

> In its narrow, perhaps popular, sense, violence is equated with unrestrained physical violence. . . . A standard history of the West would connect a decline in violence with an increase in civility. Others would see civility itself as a transformed violence, as a constraining even if not immediately coercive discipline. . . . The dissipation of simple meaning is heightened in recent sensibilities where violence is discerned in the denial of the uniqueness or even existence of the "other". . . . These expansions of the idea of violence import a transcendent ordering—an organizing, shaping force coming to bear on situations from outside of them and essentially unaffected by them.

See also Robert Paul Wolff, "Violence and the Law," in *The Rule of Law*, ed. Robert Paul Wolff (New York: Simon & Schuster, 1971), 55.

40. Drucilla Cornell suggests that the violent "foundation" of law is allegorical rather than metaphorical. "The Law of Law is only 'present' in its absolute absence. The 'never has been' of an unrecoverable past is understood as the lack of origin 'presentable' only as allegory. The Law of Law, in other words, is the figure of an initial fragmentation, the loss of the Good. But this allegory is inescapable because the lack of origin is the fundamental truth." Drucilla Cornell, "From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation," *Cardozo Law Review* 11 (1990): 1689.

41. See Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson (New York: Penguin Books, 1986). Hobbes reminds us that modern law is a creature of both a literal, life-threatening, body-crushing violence, and of imaginings and threats of force, disorder, and pain. In the absence of such imaginings and threats, there would be no law. See also Hans Kelsen, *General Theory of Law and the State*, trans. Anders Wedberg (New York: Russell & Russell, 1945); Noberto Bobbio, "Law and Force," *Monist* 48 (1965): 321; Walter Benjamin, "Critique of Violence," in *Reflections*, trans. Edmund Jepchott (New York: Harcourt, Brace, 1978); Fitzpatrick, "Violence and Legal Subjection."

42. Sarat and Kearns, "A Journey Through Forgetting," 222.

43. Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford Univ. Press, 1985).

44. Lesser, 46.

45. Ibid., 13.

tation. Murder and execution remain unknowable because they pose intractable questions about human psychology and meaning in the universe.[46] As a result, we can only grasp murder insofar as we are able to fictionalize it, to render it in art and literature. "We all seem to be interested in murderers these days," Lesser says, "They are our truth and our fiction; they are our truth *as* fiction, and vice versa."[47] Much of Lesser's book is concerned with the reasons why we are "drawn to murder," the pleasure created by a murder story, the ethical consequences of indulging in such pleasures, and the "link between pleasure and horror."[48]

Law formally disavowed the linkage between horror and pleasure when it banned public executions; no longer would law present its violence as ritual and theater to be consumed by a mass audience. Today we see this linkage revived in our literary, artistic, and mass-media representations of real and fictional murder, and in the questions of televised trials and televised executions. Despite the shift from public to private executions, the relationship between law's violence and its representation is anything but stable. This is because law is dependent on the capacity of language both to represent violence and to control violence by linguistic acts. But law's possibility is built on more than metaphors and representations.[49] Were it possible to respond adequately to violence with metaphors

46. As Richard Coe puts it, "[T]he act of murder is . . . the supreme act that destroys the status quo, whatever that may be. It . . . liberates man from the determinism of the material universe. . . . The act of murder is the absolute dividing-line between the material and the transcendental, the profane and the sacred. Once crossed, the past no longer has any relevant existence, time ceases; the future is an open choice, and the necessity for choice has itself been freely chosen . . . ." *The Vision of Jean Genet* (London: Owen, 1968), 180-81.

47. Lesser, 2.

48. Ibid., 8.

49. The law constituted, in part, in response to metaphorical violence is an agent of literal violence; law as the peaceful alternative to the chaos and fury of a fictive state of nature inscribes itself on bodies. See Foucault, *Discipline and Punish*, chap. 1. See also Franz Kafka, "In the Penal Colony," in *The Penal Colony: Stories and Short Pieces*, trans. Willa Muir and Edwin Muir (New York: Schocken Books, 1976). As Virginia Held puts it, "The legal rules of almost any legal system permit the use of violence to preserve and enforce the laws, whether these laws are just or not, but forbid most other uses of violence." Virginia Held, "Violence, Terrorism, and Moral Inquiry," in *Ethical Theory and Social Issues: Historical Texts and Contemporary Readings* (New York: Holt, Rinehart, 1988), 475.

alone, law would be superfluous.[50] If there were no need for an all-too-literal violence, there would be no need for law.[51]

Lesser aptly illustrates that law's relationship to violence exists in the tangle of the literal and metaphorical; nowhere is this more vividly demonstrated than in capital punishment.[52] Yet law constantly appears and presents itself as a means of disentangling the literal from the metaphorical.[53] Law seeks to be, or to define, the boundary between life and death, guilty killing and innocent execution, the real and the fictive, the possible and the unimaginable.[54] Moreover, the

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50. As Cover so graphically puts it, law "deal[s] pain and death" and calls the pain and death which it deals "peace." Cover, "Violence and the Word," 1609. Cover insisted, even at the price of doing linguistic violence, that "the violence . . . [of law] is utterly real—in need of no interpretation, no critic to reveal it—a naive but immediate reality. Take a short trip to your local prison and see." Robert Cover, "The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role," *Georgia Law Review* 20 (1986): 818.

Cover was both a critic of, and an apologist for, law's violence. In his critical mode, he saw the fury of state law as a barrier to the achievement of a normatively rich, legally plural community, and he urged judges to go far in tolerating and respecting the normative claims of communities whose visions of the good did not comport with the commands and requirements of state law. It is never enough, in Cover's view, for a judge to retreat to the positivist assertion that deference and obedience is required merely because state law commands it.

Yet Cover recognized the need for law's occasional violent impositions, and he attended carefully to the prerequisites for law's successful use of violence. For law to achieve such success, its social organization would have to find resources to both overcome and regulate cultural and moral inhibitions against the use of physical force. For law's violent impositions to work in the world—for words to be translated into violent deeds—justifications, strong justifications, would have to be provided. Here Cover was more apologist than critic.

There is, in essence, a two-fold message in Cover's work: "Wherever possible, withhold violence and let new worlds flourish; but do not forget that, for the sake of life, law's violence will sometimes be necessary and the conditions of its effective deployment must be carefully provided for. . . . To do its job, then, law *must* be violent, but *sparingly*." See Austin Sarat and Thomas R. Kearns, "Making Peace with Violence: Robert Cover on Law and Legal Theory," in *Law's Violence*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: Univ. of Michigan Press, 1992).

51. "If a law cannot exist apart from the exercise of force, then laws *must* desire transgressions. Since law *is* the resistance of transgression, law needs and yet cannot bear transgression. Transgressions, in turn, are not really lawless but are other laws that themselves desire transgressions." Mark Taylor, "Desire of Law/Law of Desire," *Cardozo Law Review* 11 (1990): 1272. See also Jan Narveson, "Force, Violence, and Law," in *Justice, Law, and Violence*, ed. James Brady and Newton Garver (Philadelphia: Temple Univ. Press, 1991), 150.

52. Lesser contends that all trials have a "fiction-like quality" that can be "attributed to the theatrical nature of the legal process itself." Lesser, 125.

53. Derrida, "Force of Law," 919.

54. Law maintains itself, at least in part, through force and as an apparatus of violence which disorders, disrupts, and repositions pre-existing relations and practices, all in the name of an allegedly superior order. See Benjamin, "Critique of Violence," 287. See also Karl Olivecrona, *Law as Fact* (Copenhagen: Einar Munksgaard, 1939), chap. 4, and Martha Minow, "Words and the Door to the Land of Change: Law, Language and Family Violence," 43 *Vanderbilt Law Review* (1990): 1672 14. As Minow puts it, "Law is itself violent in its forms and methods. Official power effectuates itself in physical force . . . ."

Law demonstrates its "superiority" in ferocious displays of force and in subjugating, colonizing, "civilizing" acts of violence. Edgar Friedenberg contends that "[t]he police often slay; but they are seldom socially defined as murderers. Students who block the entrances to buildings or occupy a vacant lot and attempt to build a park in it are defined as not merely being disorderly but violent; the law enforcement officials who gas and club them into submission are perceived as restorers of order, as, indeed, they are of the *status quo ante* which was orderly by definition." Edgar Friedenberg, "The Side Effects of the Legal Process," in *The*

continued existence of law stands as a monument to a precarious hope that words can contain and control violence, that unspeakable pain can be made to speak, and that aggression and desire can be tamed and be put to useful public purposes. If law is to succeed it must conquer, or appear to conquer, force, and it must calm, or appear to calm, turmoil.[55]

Thus law denies the violence of its origins,[56] as well as the continuing disorder engendered by its own efforts at ordering and peacemaking, by proclaiming that the force it deploys is "legitimate."[57] As Robert Paul Wolff argues, violence is, in the eyes of the law, "*the illegitimate or unauthorized use of force to effect decisions against the will or desire of others.* Thus murder is an act of violence, but capital punishment by a *legitimate state* is not."[58] In and through its claims to legitimacy, what law does is privileged and distinguished from "the violence that one always deems unjust."[59] Legitimacy is thus one way of charting the boundaries of law's violence. It is also the minimal answer to skeptical questions about the ways in which law's violence differs from the turmoil and disorder law is supposed to conquer. But the need to legitimate law's violence is nagging and continuing; it cannot be fully resolved in any single gesture.[60]

Rule of Law, ed. Robert Paul Wolff (New York: Simon & Schuster, 1971), 43; Fitzpatrick, "Violence and Legal Subjection," 15; Tzvetan Todorov, *The Conquest of America: The Question of the Other*, trans. Richard Howard (New York: Harper & Row, 1984).

55. This requires that legal violence be domesticated. This domestication requires a reconciliation between violence and reason. On the general problematic of violence and reason, see Sarat and Kearns, "A Journey Through Forgetting," 265-73. This reconciliation is always difficult, always precarious. Thus violence stands as the limit of law and as a reminder of both law's continuing necessity and its ever present failing. Without violence, law is unnecessary, yet, in its presence, law, like language and representation themselves, may be impossible. Scarry, *The Body in Pain*, Introduction. See also Carl Wellman, "Violence, Law, and Basic Rights," in Brady and Garver, eds., *Justice, Law, and Violence.*

56. Derrida, "Force of Law," 983-84.

57. See "Violence and the Law," in Wolff, ed., *The Rule of Law.* See also Bernhard Waldenfels, "The Limits of Legitimation and the Question of Violence," in Brady and Garver, eds., *Justice, Law, and Violence.* For a classic discussion of legitimacy see Max Weber, *Max Weber on Law in Economy and Society*, ed. Max Rheinstein (Cambridge: Harvard Univ. Press, 1954). An important study of the production of legal legitimacy is provided by Douglas Hay, "Property, Authority and the Criminal Law," in Douglas Hay et al., *Albion's Fatal Tree: Crime & Society in Eighteenth-Century England* (New York: Pantheon Books, 1975).

58. Wolff, "Violence and the Law," 59.

59. Derrida, "Force of Law," 927. See also Friedenberg, "Side Effects," 43, who argues, "If by violence one means injurious attacks on persons or destruction of valuable inanimate objects . . . then nearly all the violence done in the world is done by legitimate authority, or at least by the agents of legitimate authority engaged in official business. . . . Yet their actions are not deemed to be violence."

60. See Robert Weisberg, "Private Violence as Moral Action: The Law as Inspiration and Example," in Sarat and Kearns, ed., *Law's Violence.* Walter Benjamin argues that "in the exercise of violence over life and death more than in any other legal act, law reaffirms itself. But, in this very violence something rotten in law is revealed, above all to a finer sensibility, because the latter knows itself to be infinitely remote from conditions in which fate might imperiously have shown itself in such a sentence." See Benjamin, "Critique of Violence," 286. See also Camus and Koestler, *Refléxions.*

This is never more apparent than in capital cases. In such cases one witnesses the discursive constitution of law's violence as rational, controlled, and purposive, and the juxtaposition of the alleged rationality of legal coercion with the irrationality of a violence that knows no law.[61] These cases are thus both the "field" of pain and death on which law plays, and the field of its discursive representation. Here one encounters claims that law's violence is controlled through values, norms, procedures, and purposes external to violence itself, and that law serves common purposes and advances common aims against the savagery beyond law's boundaries.[62]

These claims are vividly on display in a clash between Justices Scalia and Blackmun over *Callins v. Collins*, the Supreme Court's recent refusal to review a death penalty case.[63] Scalia concurred in the denial of certiorari and defended the death penalty as a legitimate form of violence, while Blackmun dissented and issued a stinging condemnation of capital punishment.

Blackmun spoke out in what otherwise would have been a little noticed denial of a death-row inmate's last-minute petition for a hearing on his claim of a constitutional defect in the procedures used to sentence him to death. It would have been little noticed because such denials are, for the Rehnquist Court, quite routine. Where once the Court said "death is different" and insisted on the greatest scrupulousness in handling capital cases,[64] today the Court has grown increasingly impatient with, and unresponsive to, the complex legal maneuvers of inmates on death row. This is so in spite of the death penalty's enormous cost, in financial[65] and, as Lesser's comparison to murder reminds us, moral terms.

Blackmun's opinion does not, however, advocate a stop to law's killing because of either its financial or moral cost. In *Herrera v. Collins*,[66] he concluded his opinion by noting that "the execution of a person who can show that he is innocent comes perilously close to simple murder."[67] But in *Callins*, Blackmun insisted that capital punishment must be stopped because of what such killing does to law itself. By turning away from the comparison of capital punishment to

61. See Sarat, "Speaking of Death," 19.

62. See Susan Jacoby, *Wild Justice: The Evolution of Revenge* (New York: Harper & Row, 1983). See also Jonathan Rieder, "The Social Organization of Vengeance," in *Toward A General Theory of Social Control*, ed. Donald Black (New York: Academic Press, 1984).

63. 114 S. Ct. 1127 (1994).

64. See Woodson v. North Carolina, 428 U.S. 280, 322 (1976).

65. See Mark Costanzo and Lawrence White, "An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures, and Cost," *Journal of Social Issues* 50 (1994): 10.

66. 113 S. Ct. 853 (1993) (Blackmun, J., dissenting).

67. Ibid., 884.

murder, Blackmun alerted us to a powerful argument against the death penalty which is not based on any shared moral aversion to execution, but instead on a shared commitment to the values of legality.[68] Here he rightly insisted that law's violence must be different and better than the violence to which it is opposed, and regretfully he concluded that this distinction could no longer be made in capital cases. A similar insistence and conclusion is found in Lesser's argument that the death penalty is a form of murder. "It is not," she contends, "just the moment itself that constitutes the death penalty—it's all those horrible moments leading up to the execution as well."[69]

However, Lesser's comparison of capital punishment to murder invites precisely the response provided by Scalia in *Callins*. Scalia called attention to the fact that Blackmun's critique of capital punishment came in a case involving "one of the less brutal murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern."[70] In Scalia's rather sanguine view, death by lethal execution "looks pretty desirable next to that."[71] Law's violence, in his view, is less brutal, less sudden, less inhumane than extralegal violence. Yet his position remains hauntingly insufficient. It is never enough for law to defend its violence simply because it is less gruesome and brutal. It is never enough to defend the death penalty because law's methods of killing allow inmates on death row to prepare themselves and their affairs.

Blackmun understands this. In his view, if law's violence is to be different from, and better than, the violence to which law is opposed, it must be consistent, rational, and nondiscriminatory. In *Callins*, he reminded us of the efforts of the Supreme Court, at least until recently, to realize those values in the administration of the death penalty.[72] Blackmun noted that, from *Furman v. Georgia*[73] onwards, the Supreme Court sought to devise procedures to insure that the death penalty comported with the requirements of due process and equal protection. Blackmun directed his critique at the failure of those efforts: "[D]espite the effort of the States and courts to devise

68. It is this argument that opponents of the death penalty are now eagerly embracing. See Austin Sarat, "Between (The Reality of) Violence and (The Possibility of) Justice: Lawyering Against Capital Punishment," (manuscript, 1995).
69. Lesser, 257.
70. Callins v. Collins, 114 S.Ct. 1127, 1128 (1994) (Scalia, J., concurring).
71. Ibid.
72. Ibid.
73. 408 U.S. 238 (1972).

legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[74]

Law has failed to administer the death penalty in such a way as to ensure that errors are not made, that innocent people are not executed, and that racial minorities are not unfairly singled out to receive law's ultimate sanction. This failure is not, however, a failure of will or of effort. After two decades of trying, it is now clear that we cannot have the fairness and the consistency that the Constitution requires in the administration of capital punishment. We cannot have discretionary and individualized sentencing without introducing the possibility of caprice and prejudice.

In this failure, law's legitimacy is undermined. Is it better, Justice Blackmun asks, to have arbitrariness, caprice, and discrimination inside law, or to renounce a punishment, which, however popular, endangers law itself? Whether or not one agrees with Lesser's contention that capital punishment is a form of murder, surely Blackmun is right when he suggests that in the face of a lethal danger to the values of our constitutional order, one should "no longer . . . tinker with the machinery of death."[75]

The events surrounding the execution of Jesse Jacobs in Texas this past January provide a dramatic reminder of the wisdom of Blackmun's admonition. The Jacobs case is also the most recent instance in a string of decisions in which the Supreme Court has upheld death sentences while trimming back or sacrificing the ideals which lend dignity and legitimacy to our legal order—due process, equal treatment, and the protection of innocent people from undeserved punishment.[76] Jacobs was convicted for the 1986 killing of a woman, Etta Urdiales, with whose estranged husband his sister was romantically involved. Jacobs confessed to the crime and was convicted, but he later claimed the confession was false. He denied shooting Urdiales and said that his sister had shot her without his knowledge or participation. During his trial the prosecution had contended that "Jesse Jacobs and Jesse Jacobs alone killed Etta Ann Urdiales."[77] As a result, Jacobs was convicted and sentenced to death.

Several months later, the state of Texas put Jacobs's sister, Bobbie Hogan, on trial for the same murder and renounced its earlier contention that Jacobs had shot Urdiales. The prosecutor called Jacobs as a witness against his sister and told the jury that "evidence revealed [through further] investigation cast doubt on Jacobs's

74. *Callins*, 114 S.Ct. at 1129 (Blackmun, J., dissenting).
75. Ibid at 1130.
76. See Jacobs v. Scott, 115 S. Ct. 711 (1995).
77. Ibid.

conviction."[78] He said that he had determined that Hogan, not Jacobs, had killed Urdiales and that Jacobs did not in any way anticipate that the victim would be shot. Hogan was subsequently convicted.

Hogan's conviction and the prosecution's argument about Jacobs raised a substantial doubt about whether Jacobs was innocent of capital murder. Nevertheless Texas, with the acquiescence of the United States Supreme Court, executed Jesse Jacobs. So complete was the Court's acquiescence that, in spite of serious questions about Jacobs's guilt, the Court refused even to hear the case. As Justice Stevens points out it in his dissent from that refusal, "If the prosecutor's statements at the Hogan trial were correct, then Jacobs is innocent of capital murder. . . . [I]t would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed."[79]

In other death penalty cases, additional legal values have been forfeited in order to facilitate executions. In 1987, the Court altered its equal protection jurisprudence to allow the execution of Warren McCleskey in the face of overwhelming evidence of the racially discriminatory nature of capital punishment.[80] And in 1991, Justice Rehnquist baldly cast aside the binding force of precedent to allow so-called "victim impact" evidence in capital cases.[81] In each of these cases law itself was the ultimate loser, for the values that breed public respect for law were openly sacrificed to keep the machinery of death in motion.

Saying, as Lesser does, that execution is murder is not a particularly powerful response to this situation or to the political popularity of capital punishment. If such a response is to be found, it is to be found in Blackmun's insistence that the death penalty damages the legal system that it is designed to serve. Yet Lesser's effort to equate capital punishment with murder may help explain why the modern death penalty has been hidden from public view. Silencing the condemned and limiting the visibility of lawfully imposed death is part of the modern bureaucratization of capital punishment, and part of the strategy for transforming execution from an arousing public spectacle of vengeance into a soothing matter of mere administration. In Foucault's words, "it . . . [was] as if this rite that 'concluded the crime' was suspected of being in some undesirable way linked with it. It was as if the punishment was thought to equal, if not exceed, in

78. Ibid.
79. Ibid.
80. McCleskey v. Kemp, 481 U.S. 279 (1987).
81. Payne v. Tennessee, 501 U.S. 808 (1991).

savagery the crime itself . . . to make the executioner resemble a criminal, judges murderers."[82] Foucault illustrates the instability of the boundary between law's violence and violence outside the law, and takes us back to Lesser's rejection of capital punishment as a form of murder. At the same time, he paves the way for a discussion of Lesser's argument concerning televising executions and the privileges of viewing.

III. VIOLENCE AND THE VISUAL

A. What the Eye Cannot See

On January 16 and 17, 1995, ABC's *Nightline* broadcast a two-part series focusing on a single execution in Texas.[83] On the first night the program presented various inmates on Texas's death row, including Mario Marquez, the man scheduled to be executed. We saw the prison and its daunting architecture, met Marquez's lawyer as well as some of the people who would carry out the execution, and repeatedly viewed the death chamber and the hospital gurney on which the condemned would be strapped to receive his lethal injection. At the end of the first night's broadcast, Ted Koppel made the dramatic announcement that he was going to witness the Marquez execution that very night. Koppel explained his decision to be a witness by saying, "If we are going to live with capital punishment, we have to see it and know what it is about." He did not say that he was going to show the actual execution to his viewers. Koppel spoke of a "we" who were there; in so doing, he faintly echoed, while dramatically altering, Edward R. Murrow's famous phrase, "You are there." However, despite Koppel's insistence that executions have to be seen, he could not show them to us. The "we" who were there did not include his viewing audience. He could only report on what he was going to see. And report he did the very next night.

In the second installment viewers were again shown the death chamber, only this time we followed as the witnesses, including Koppel, were assembled, searched (to insure that they were carrying no recording equipment), and led to the witness room to see what the television audience would not be allowed to see. Koppel calmly reminded his viewers, "We can't show it [the execution] to you, but we were there and we will tell you about it." Thus this television program had to rely on verbal descriptions of the execution itself and its effects on the condemned. Koppel noted that "[t]here was a short

82. Foucault, *Discipline and Punish*, 9.
83. *Nightline* (ABC television broadcast, 16 and 17 January 1995).

explosion of breath. That is all there was to see." Another witness said that the execution was like "seeing a dog euthanized. He was gone the moment he gasped." These verbal descriptions could not help calling attention to the exclusion of television from the execution itself. It is ironic that ABC would air a program that dramatically called attention to the very fact that television was excluded from the event that demanded to be seen. Television's act of "showing itself not showing" was made even more remarkable because it was done without giving more than the most cursory attention to this irony.[84]

The fact that Koppel was unable to show us what he saw is the result of a series of cases, *KQED v. Vasquez* among them, in which courts have acknowledged the right of legislative and executive officials to regulate and control the conditions under which punishments are administered and who is permitted to see them. These cases date back to 1890 when, in *Holden v. State of Minnesota*,[85] the Supreme Court refused to invalidate a death sentence on the basis of certain alleged inconsistencies and procedural irregularities in state statutes and regulations. Justice Harlan, writing for the Court, accorded wide latitude to legislatures in setting the terms on which executions could be carried out:

> Whether a convict sentenced to death shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. . . . These are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe.[86]

Such authority allowed state legislatures to change execution from the kind of ferocious display that Foucault described to the secluded, bureaucratic procedure now found wherever the death penalty is an authorized punishment. As part of this change, *Holden* also allowed states to adopt regulations concerning the witnessing of executions and controlling press access. Legislatures could closely regulate the prerogative to see an execution. In so doing, they could make executions less dangerous to sovereignty and to those who carry out its death-inflicting acts. The exclusion of the public means the exclusion of the court of last resort; no longer can the people rise up

84. See Avital Ronell, *Finitude's Score: Essays for the End of the Millennium* (Lincoln: Univ. of Nebraska Press, 1994), 317.
85. Holden v. Minnesota, 137 U.S. 483 (1890).
86. Ibid., 491.

to save the condemned; no longer is the people's judgment truly the last word in inflicting death.

But the exclusion of the public does not solve the problem of spectatorship; even within the prison's secret chamber, select press representatives, the warden, perhaps a few friends and family members, and the executioner watch the condemned man die. This "structure of watching" within the execution chamber reflects the effort of the state to minimize the pleasures of looking by effecting death as mechanically and precisely as possible.[87] This structure is described by Susan Blaustein, a reporter who recently offered this account of witnessing an execution:

> Near Cook's head stood Warden Jones; near Cook's feet stood Reverend Pickett, his hands folded. Suddenly I saw movement in front of me and realized that on Cook's far side was a one-way mirror in which we all were reflected. It was our own movement, not that of the symmetrical threesome in the death chamber itself, that had been captured in the glass. The effect was eerie; not only would I witness an execution but I would witness myself witnessing it. Behind the mirror, in an adjacent room, stood the executioner (whether man or woman, or more than one, no one would tell me), who would, upon a signal from the warden, activate the death device.[88]

That one-way mirror marks the boundary between victim and executioner, physically separating them while allowing the executioner to control the gaze. As unseen and anonymous, the executioner loses all personality and virtually melds into the machinery itself.[89] The relationship between the condemned and the apparatus of death supplants the human relation between victim and executioner; modern law strives for a death without a putting to death, an execution without an executioner.[90] The one-way mirror accords the executioner unrestricted sight while obscuring him (or her) from the gaze of the victim and the witnesses; it works like the lens of the

87. Warden Vasquez specifically addressed this issue in the KQED case when he said that he wanted the execution to "be carried out with tactfulness and precision." Lesser, 203.

88. Blaustein, "Witness to Another Execution," 60-61.

89. "Reading the newspaper articles devoted to the death of Anatole Deibler, the Republic's 'high executioner,' one would say that society discovered the existence of its executioner only through his death. . . . This man made the heads of four hundred of his fellow men fall and each time curiosity was directed toward the one executed, never toward the executioner." Caillois, "The Sociology of the Executioner," 234. See also Geoffrey Abbott, *Lords of the Scaffold: A History of the Execution* (New York: St. Martin's Press, 1991).

90. Johnson, *Death Work*, 5. As Blaustein notes about death by lethal injection, within a few minutes, "the show was over; the passage from life to death was horrifyingly invisible, a silent and efficient erasure." Blaustein, "Witness to Another Execution," 61.

televising camera.[91] It allows the executioner to be both the deadly instrument of law and the one to whom law reveals its deadly secret.[92]

The execution chamber thus reveals that the problem of sight, the questions of who may see, whom may be seen, and what may be shown, are at the center of the death penalty itself. In this tightly controlled setting, the camera would stand as a mechanical intruder, a metonymic signifier for the unruly crowds that once gathered at public executions. Rather than simply transmitting an image of solemn and dignified ceremony to an attentive outside world, the presence of the camera would signify the flood of thousands, or millions, of uncontrollable looks into the execution chamber. While Lesser believes that "modern videotape technology makes it possible to bring millions of 'witnesses' into the death chamber without noticeably altering the nature of the event,"[93] we believe that with those looks would come resistances, demands, assertions of power—some demanding more vengeful pain, some demanding the end of death imposed in the name of popular sovereignty.

B. Judging Television

Prohibitions on televising executions have on several occasions in recent years been subject to, and survived, constitutional challenges. The first and most important of these cases, *Garrett v. Estelle*,[94] arose when a television reporter in Texas sought permission to film and show the first execution in that state after the post-*Furman* hiatus in capital punishment. He challenged, on First Amendment grounds, the State Department of Corrections' refusal to allow him to do so. The state contended that it had a compelling interest in regulating the procedures through which executions were to be conducted. It argued that "the press has no greater right of access" than does the public and "since the public has no right under the First Amendment to film executions, a member of the press has no such right."[95]

The Fifth Circuit Court of Appeals reversed a district court ruling which had favored the reporter on the ground that "the First Amendment does not invalidate nondiscriminatory prison access regulations."[96] The appellate court held that the bar on televising

91. Lesser describes the experience of viewing a murder on television as "getting the experience from behind a protective wall of glass—the television screen." Lesser, 147.
92. Ibid., 108.
93. Ibid., 32.
94. Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977).
95. Ibid., 1277.
96. Ibid., 1278.

executions was a permissible "time and place," rather than content-based, restriction. As Judge Ainsworth explained,

> In the present case . . . , access is provided except for one purpose, to film executions. In order to sustain Garrett's argument we would have to find that the moving picture of the actual execution possessed some quality giving it 'content' beyond, for example, that possessed by a simulation of an execution. We discern no such quality from the record or from our inferences therein. Despite the unavailability of film of the actual execution the public can be fully informed; the free flow of ideas and information need not be inhibited.[97]

In this passage Ainsworth moves from judge to film critic as he assesses the power and significance of the visual representation of violence. He positions himself as qualified to speak about the special qualities of the moving image, only to hold that they have no special qualities at all. His opinion contains an implicit theory of representation in which a televised video is by no means superior to a "simulation of an execution," and by which we are assured that the capacity of the public to be informed about what transpired would not be impeded by exclusion of the camera. Yet even Lesser contends that "there is a difference between planning to watch a real, scheduled murder take place on television, and watching either a simulated execution or a real but unscheduled murder."[98]

In Ainsworth's approving references to simulation he concedes the special power of the visual to convey information even as he claims that the "unavailability of film of the actual execution" does not inhibit "the free flow of ideas and information." The court's decision turns on this problematic passage. In order to sustain the Texas prohibition on televising executions, Ainsworth argues that no privilege can be given to a video representation of a real execution as opposed to an imaginative reconstruction; a film of a real execution is no more real than that execution's dramatic reenactment.

He goes on to note that "there is no effort here to conceal conditions at the prison or inhibit press investigations of those conditions."[99] It is not that something real exists which the state is hiding, but instead that there is simply nothing "real" to be seen. Like Lesser, Ainsworth suggests that with an execution we can never get at the thing itself. By refusing to privilege the film of an actual execution, Ainsworth implies that the death penalty has neither fixed meaning nor singular significance, but may be represented,

97. Ibid.
98. Lesser, 39.
99. *Garrett*, 556 F.2d at 1279.

interpreted, or recast in a number of different, and equally plausible, ways. It is almost as if he were embracing a postmodern understanding in which signs and referents float free of one another.

Judge Ainsworth found nothing indecent or unacceptable about allowing some people to actually witness someone being executed. Thus members of the press, like Ted Koppel, could be present and could report on what they had seen. However, in Ainsworth's view, the camera added nothing, and hence nothing would be lost by its exclusion. Rejecting the maxim that "one picture is worth a thousand words," Ainsworth claimed that film made available nothing that could not be conveyed by words or reenactments, a position that somewhat paradoxically derives support from Koppel's recent television program. Moreover, the judge contended that "televising an execution would amount to conducting a public execution" and would thus "frustrate the official policy of the State of Texas" which banned public executions in 1920.[100]

Ainsworth did not pause to consider what makes an execution public. Yet implicit in his opinion is the view that televising an execution is what moves it into the domain of an unacceptable public spectacle. But surely there is more to the question of whether an execution is public than whether it is made available through a particular representational medium. An execution by its very nature is public in meaningful ways. It is not made public by a particular mode of representation, nor can it be made "private" by denying access to that mode of representation. Executions are public in the sense that they are a state-imposed punishment for an offense against the law. They are public in the sense that their conduct is regulated by public norms. And they are public enough that they can, and must, be seen by witnesses.

In *Garrett*, Ainsworth not only fails to acknowledge the public nature of capital punishment, he completely collapses the distinction between witnessing an actual execution and watching an execution on film. One could imagine a court differentiating televised executions from public executions by arguing that while public executions were dangerous or unruly, televising them would not be. As Lesser reminds us, the dynamic of spectatorship is quite different when viewers are isolated, watching alone or in small groups rather than in the mass audiences that often witnessed executions in public.[101] Yet Ainsworth's opinion suggests that televising itself threatens to transform the execution, reopening the possibility of public control

100. Ibid., 1279-80.
101. Lesser, 170.

over the terms of punishment. By making capital punishment visible to a mass audience, television would link today's solemn and dignified execution to the history of blood, cruelty, and "festival" that once marked public executions.[102] Ainsworth is right to suggest such an association. It is this linkage, and the political issue of who will control capital punishment, that should be at the heart of the debate about televising executions, but that is generally neglected by Lesser in *Pictures at an Execution.*

Like Ainsworth, Lesser opposes televising executions. However, she misses the crucial political questions which must be addressed as we think about television, capital punishment, and law's violence. Lesser's opposition is based, in part, on her own judgment of the medium and its representational capacities. Like Ainsworth, she does not oppose the representation of execution in literature, art, or film; television is singled out for special attention. But unlike Ainsworth, who thinks that television adds nothing to the way we would know or understand execution, Lesser thinks television actually gets in the way. Televised executions, she contends, turn death into a "pure spectacle, unmediated by the understanding and knowledge that convert spectacle into experience. Far from 'being there' with the condemned man, we would be completely outside him, viewing him as an easily liquidatable object."[103] Television gets in the way by pretending to a false objectivity. "KQED's special case for television," Lesser says,

> focused heavily on the idea of the camera's objectivity. In so doing, the plaintiff's side appeared to confuse two different senses of the word: on the one hand, our sense that an objective report is disinterested, honest, reliable, impartial; and, on the other hand, the sense that only something which is not subjective—which does not partake of the individual human viewpoint—can be fully objective, neutrally conveying things and events that are out in the world without the distorting coloration of human consciousness. A good newspaper reporter can be objective in the first sense . . . , but only a machine like a television camera could possibly be objective in that second sense. And even that possibility seems remote. . . . [I]n order to become a functional picture of reality, even television's images need to be absorbed by our particular minds. The picture itself can have no meaning until viewers make something of it . . . .[104]

In Lesser's view, television is a barrier, not an aid, to understanding because the only way to know murder/death is through acts of

102. Foucault, *Discipline and Punish*, 59, 63.
103. Lesser, 141.
104. Ibid., 139.

imagination. She argues that "the television news camera, purporting to give us unmediated reality, all the while leaves out something crucial."[105] Lesser quotes antideath penalty activist and lawyer David Bruck who says that "'[t]he truth of the matter is that the public's imagination of what this must be like—and I say this having seen two of these executions take place—the public's imagination is much truer than what they would see on TV.'"[106] The murder story (and executions are always murder stories), she contends, "is about what must be imagined, what can't actually be seen—what can't, in any verifiable way, be known." The journalistic TV camera, Lesser notes, "has no projective imagination."[107]

Rather than exploring, as she promises at the outset, the "increasingly blurry borderline between real murder and fictional murder,"[108] Lesser's arguments erect strict boundaries between the real and the fictional, testimony and literature, knowledge and imagination. Having erected such boundaries, Lesser consistently privileges literary representations of murder over their allegedly nonfiction counterparts. In her view, art gives meaning and sense to the otherwise elusive and terrifyingly unexplainable murder:

> The murders rendered in art are reassuringly not our own: we can't experience murder, and we don't wish to. . . . [Yet] the game of art won't work if we don't at least partially believe in the reality of the fictional deaths being described to us. . . . We may be least likely to believe in, in the sense of caring about and being frightened by, those murders which are the most newsworthy. For the newsworthy, the real, is quite often unexplainable.[109]

Thus, "art about murder tends to be about the search for structure and meaning in an apparently random existence."[110]

Real-life murder tales, for Lesser, seem inadequate compared to fiction for they fail to provide a sense of closure. More importantly, however, they often fail to pay the proper homage to their subject. Lesser compares the narration provided by the character of Lou Ford, in Jim Thompson's novel *The Killer Inside Me*, to Joan Didion's narration in "The White Album." Both the fictional Lou Ford and the real Joan Didion engage in what Lesser calls "untrammeled narcissism," focusing on their own incoherent jumble of thoughts and

105. Ibid., 142.
106. Ibid.
107. Ibid.
108. Ibid., 1.
109. Ibid., 17.
110. Ibid., 18.

feelings in reaction to two different murders. Yet, while she calls Ford's voice "amusing and persuasive," she criticizes Didion's comments as "deeply offensive and filled with bad faith."[111]

Because Ford is a mere character in a story, he has a certain degree of freedom. "When one is dealing with murder, there is something liberating about the fictional mode, and something conversely restrictive about choosing to deal with reality."[112] The realness of Didion imposes certain obligations on her, "the responsibilities of narrative."[113] These obligations flow from the moral value Lesser places on putting oneself "at risk." Didion, Lesser notes, presumes to speak about murder, to offer "the determining sensibility by which we are asked to abide . . . without having gone to the limit itself, without having committed the actual crime and risked punishment, as Lou Ford does."[114] Because she has not risked anything, Didion has no right to speak with such freedom about the subject of murder.[115]

Thus, a televised execution not only would provide a "bad story," but would, in Lesser's view, constitute a moral violation. Rather than offering a richly shaped and authorially controlled murder tale, the camera would purport to show murder itself, to an audience which has put nothing at risk. Television fails to pay respect to the "thing in itself" aspect of death, and is a poor substitute for other media precisely because it fools us into thinking that we have access to what is, in truth, an inaccessible knowledge.

Lesser attributes this argument to Bruck, who she reports "challenged the truth of what the camera would show."[116] For Bruck, televising executions would give a false and misleading picture of the damage and suffering which is necessarily part of the capital punishment process (e.g., the years on death row, the damage to the families of the condemned).[117] Viewers of the recent *Nightline*

111. Ibid., 71.

112. Ibid.

113. Ibid., 76. We have some difficulty understanding what Lesser has in mind when she speaks about the greater responsibilities that attach to the author of nonfiction accounts of murder. As Foucault puts it in "What Is an Author?," "Everyone knows that, in a novel narrated in the first person, neither the first-person pronoun nor the present indicative refers exactly either to the writer or to the moment in which he writes, but rather to an alter ego whose distance from the author varies, often changing in the course of a work. It would be just as wrong to equate the author with the real writer as to equate him with the fictitious speaker; the author function is carried out and operates in the scission itself, in this division and this distance." *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 112.

114. Lesser, 73.

115. Lesser offers a similar analysis of Joe McGinniss's book *Fatal Vision*: "Like the Didion example, the McGinniss version of entering the mind of the murderer is filled with bad faith: he wants credit for plumbing the abysses, and yet he hasn't had the nerve, if that's the right word, actually to go to hell himself." Ibid., 79.

116. Ibid., 141.

117. For a contrary view from a proponent of capital punishment, see Ernst van den Haag, "The Ultimate Punishment: A Defense," *Harvard Law Review* 99 (1986): 1662, 1667 n. 22.

programs certainly may have come away thinking that they understood the suffering that is part of capital punishment, and like Koppel may have been ready to conclude that "life in prison seems more devastating than this death [by lethal injection]." In doing so, viewers would confirm Bruck's concern that television would be false precisely because it would not convey enough. But is this an argument against televising executions, or instead for a more searching media scrutiny of the entire process of execution?

While no court has been willing to order the televising of an execution,[118] Lesser's skepticism about television's ability to convey useful and usable knowledge is not fully shared by the judiciary. In several cases having nothing to do with televising executions, the courts have spoken about the special virtues of television as a carrier of information. Thus in *Houchins v. KQED*,[119] the Supreme Court upheld local officials' refusal to permit a television station to take photographs of the portion of a local jail where a prisoner's suicide reportedly had occurred. Yet Justice Stewart, while he concurred in the result, advocated a flexible approach in deciding when and with what restrictions the press could be granted access to penal institutions. Stewart noted that our society "depends heavily on the press" for the information upon which enlightened political choices are made.[120] Moreover, he argued that the Constitution requires great sensitivity to the role of the press and to the "special needs" of the press in performing its role effectively.[121] "A person touring Santa Rita jail," Stewart continued,

> can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot visit the place, he must use cameras and sound equipment. In short, terms of access that can be reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what visitors see.[122]

Here Stewart links "effective" reporting to the ability of cameras and sound equipment to capture and covey "sights and sounds." For him

118. See Lawson v. Dixon, 25 F.3d 1040 (4th Cir. 1994); Philadelphia Newspapers, Inc. v. Jerome, 387 A.2d 425 (Pa. 1978), *appeal dismissed*, 443 U.S. 913 (1979); Halquist v. Department of Corrections, 783 P.2d 1065 (Wash. 1989).
119. 438 U.S. 1 (1977) (Stewart, J., concurring).
120. Ibid., 17.
121. Ibid.
122. Ibid.

the unique capacity of film to convey information must be recognized; not all representations are alike.[123]

A similar view, though in a very different context, was expressed by Judge Evans of the Federal District Court for the Northern District of Georgia. CNN brought an action challenging "limited coverage" events at the White House, which allegedly gave favored status to ABC, CBS, and NBC.[124] Judge Evans granted a temporary injunction against the restrictions imposed by the White House and suggested that the

> interest of the public in having the television media present at "limited coverage" White House events while not overwhelming cannot be denominated as insubstantial. . . . [I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news. Further, visual impressions can and do sometimes add a material dimension to one's impression of particular news events. Television coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.[125]

For Evans, unlike Lesser, there is something irreplaceable about the visual image conveyed by television. And, as Justice Powell suggested in his dissent in *Zacchini v. Scripps-Howard Broadcasting*, the "public is . . . the loser" when coverage of "clearly newsworthy events" is confined to "watered-down verbal reporting, perhaps with an occasional still picture."[126]

In an ironic twist to the Harris execution, after *KQED v. Vasquez* upheld the state's prohibition on the media's use of television cameras to film the execution, another judge ordered that the execution be videotaped so that she could view the tape to help determine whether execution by lethal gas violated the Eighth Amendment. Emphasizing the unique value of film, Judge Patel found that videotaping would provide "evidence critical to . . . [the] claim that execution by gas is torturous, painful and cruel. . . ." She noted that crucial evidence

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123. In his dissent, Justice Stevens notes:
> While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined. The reasons which militate in favor of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society.

Ibid., 36 (Stevens, J., dissenting).

124. Cable News Network v. American Broadcast Cos., 518 F. Supp. 1238 (N.D. Ga. 1981).

125. Ibid., 1245.

126. 435 U.S. 562, 581 (1977) (Powell, J., dissenting).

would be "irretrievably lost unless the impending execution is videotape recorded."[127]

In another Eighth Amendment case, a district judge in Maryland ordered the videotaping of one prisoner's execution for use in a second prisoner's challenge.[128] A crucial issue in this case was "the length of time a person remains conscious after the introduction of lethal gas into the chamber."[129] The court noted, without comment, that "the State's expert witness criticized the lay eyewitness accounts of lethal gas executions provided by [the plaintiff's] counsel as unscientific, anecdotal, and too 'emotionally' charged to be relied upon."[130] The State argued that the request to videotape should be denied because, among other things, "the Warden maintains a privilege in the area of the gas chamber during the execution of the death sentence [and because] the request is not likely to produce relevant evidence . . . ."[131]

The court rejected these contentions and ordered the videotaping "in the name of fairness, judicial economy and simple common sense, [of] relevant evanescent evidence capable of preservation [that] should be preserved so that arguments and decisions can be made with reference to the best and fullest evidence available."[132] The Court further recognized that "technological advances"[133] made available new types of evidence that could be and were relevant to the venerable question of whether a particular means of execution violated the "evolving standards of decency" which are central to Eighth Amendment adjudication. Yet while noting the unique ability of film to capture the "best and fullest" evidence on a crucial matter of constitutional concern, the court also observed that the petitioner did not "seek permission to televise [the] execution, or in any way to make a public spectacle of it."[134]

What if he had? Why should the "best and fullest" evidence concerning a matter of substantial public concern—namely whether the state should be allowed to execute its citizens—be available in the limited confines of the courtroom, but not to the public at large? The

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127. Quoted in Jef I. Richards and R. Bruce Easter, "Televising Executions: The High Tech Alternative to Public Hangings," *UCLA Law Review* 40 (1992): 391. When Patel eventually made her decision on the merits of the constitutional challenge to the use of gas as a method of execution, she made no reference at all to the videotape of the Harris execution. Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994).
128. In re Thomas, 155 F.R.D. 124 (D. Md. 1994).
129. Ibid.
130. Ibid.
131. Ibid., 125
132. Ibid.
133. Ibid., 126.
134. Ibid., 127.

orders by Judge Patel in California and Judge Garbis in Maryland provide compelling testimony to the power of television to capture and convey the nature of capital punishment. Film, tape, or live pictures may reveal death by gas, by electricity, by rope, or by injection to be painful, torturous, or indecent like "euthanizing a dog." As William Turner and Beth Brinkmann put it, "In the reporting of state executions, television is indispensable in allowing the public to see and hear, for themselves, what a witness sees and hears, as opposed to having the information filtered through a reporter who may or may not be able to convey, in words, a sense of what the execution looked and sounded like."[135] While by no means objective or beyond interpretation, the camera is indeed its own kind of witness.[136] It alone can present the sight and sound of the modern execution[137] and, in so doing, disrupt the version of the legitimacy of capital punishment advanced by Justice Scalia in *Callins*.

Were television images let loose, they might "prove" too powerful to be contained. Thus, just as execution is obscured from view by the enclosures of the prison, so the videotape must be contained *in camera*, in the judge's chamber. Patel's and Garbis's decisions, allowing the filming of executions for evidentiary purposes in constitutional challenges, suggest that it is not the nature of film itself that is at the heart of the debate about televising executions. At the heart of that debate are certain assumptions about the imagined audience and its capacities, dispositions, and inclinations, and about its prerogatives to make judgments about capital punishment.

C. What Decent People Should Not See

Lesser's analysis depends on this concern for the audience even as it obscures more pressing political concerns about who controls executions. While Lesser expresses doubt about the objectivity of the camera and a belief that death is to be imagined not known, most of her argument against televising executions relates to "manners of viewing," namely to how a mass audience would use and consume images of execution. "The most persuasive reason I can think of not to televise executions," she writes, "like the most persuasive reason not to have executions, has to do with the effect on us. . . . I'm

135. William Turner and Beth Brinkmann, "Televising Executions: The First Amendment Issues," *Santa Clara Law Review* 32 (1992): 1153.

136. See Stanley Cavell, "The Fact of Television," in *Themes Out of School* (San Francisco: North Point, 1984), and *Watching Television*, ed. Todd Gitlin (New York: Pantheon, 1986). For an interesting example of a treatment of the camera as a witness, see Lawrence Douglas, "Witness for the Prosecution at Nuremberg: Screening 'Nazi Concentration Camps' Before the International Military Tribunal," (manuscript, 1995).

137. See Richards and Easter, "Televising Executions," 403.

thinking of what it would mean about us, the audience, if we allowed someone's actual murder to become our Theater of Cruelty."[138] Thus she argues that the "danger of a TV execution is that we would not take it personally."[139] She suggests that the medium would invite "coldness" in our reception to capital punishment. "It is possible," she says, "that instead of making the killing more real to us, the sight of a condemned person dying on TV might only acclimate us further to such violent images."[140] Yet the effects of televising executions on a mass audience are not likely to be so fixed and predictable; instead they are likely to be diverse and indeterminate.

Lesser's analysis reflects the common belief that television connects us "to a network of assumptions, moving us into a tract of time where our inclination to war can be satisfied without our needing to feel its most unpleasant effects, the blood, the pain, the smell of death."[141] But we can never have an unmediated relation to those effects; sure, being there would be better, but, if we can't be there like Ted Koppel, are we better off relying on his eyes and ears, and his reconstruction?

And if there is a critique to be made of televising executions, isn't it to be found in the invitation that television provides not to watch at all? In television's continuous flow of images, it is more likely that we would barely notice executions than that they would acclimate us to violence. As Thomas Dumm notes, "In contrast to film, which is viewed, what is seen on television screens is received and monitored. . . . All television formats participate in the current, feeding into the continuous broadcast available to all of us who sit at home and monitor our receivers."[142] Thus, televising executions might produce "corpses that need not be mourned because, in part, of the persistence of surviving that is shown."[143]

But televising executions, in Lesser's view, is not just an invitation to a kind of unseemly desensitization. It is an invitation to be rude, to see things that we have no right to see, and to get an "abnormal 'inside' view, seeing things from which we would normally be excluded . . . ."[144] In this seeing, we would display bad manners.[145] Here *Pictures at an Execution* seeks to mark "real and symbolic

138. Lesser, 211.
139. Ibid., 38.
140. Ibid., 39.
141. Thomas Dumm, *united states* (Ithaca: Cornell Univ. Press, 1994), 178.
142. Ibid., 182-83.
143. Ronell, *Finitude's Score*, 308.
144. Lesser, 100.
145. For an analysis of a comparable critique in an earlier period see Gatrell, *The Hanging Tree*, 595-611, and Cooper, *The Lesson of the Scaffold.*

distances between respectable and vulgar purlieus."[146] The former not only would not watch an execution, but they have an obligation to prevent the latter from indulging its indecent curiosity. Lesser argues that

> [o]ur death, which is intended for us alone, is the one experience in our life we can't directly experience. . . . We can have access to the event only indirectly, by extrapolating from the experience of others. . . . With a fictional character, this dying-through-another seems a reasonable solution. With a real person, it seems nothing short of ghoulish, as in sharing among ourselves the dying man's singular fate we make it less singular, less his own. This is why our collective presence at a condemned man's execution would be such a violation . . . .[147]

This argument echoes Foucault's understanding of the source of the "insatiable curiosity" that led people to watch executions. This curiosity was a result of the fact that "there one could decipher crime and innocence, the past and the future, the here below and the eternal."[148] Yet unlike Foucault, Lesser believes watching an execution, especially a televised execution, would be "a new kind of voyeurism. We, from the invisibility of our private livingrooms, are given the opportunity to peer into the most intimate event in someone else's life: his death."[149] Such peering, Lesser contends, would be in "extremely bad taste."[150] But execution is hardly an "intimate" event. There is nothing intimate about being strapped into an electric chair or onto a hospital gurney against one's will, by prison officials, before witnesses, and put to death. Here Lesser just gets it wrong.[151]

Ghoulish or not, the public is always present at an execution. It is present as a juridical fiction, but as more than a fiction—as an authorizing audience unseeing and unseen, but present nonetheless. This is the haunting reality of the death penalty in a constitutional democracy. So long as there is capital punishment in the United States the only question is the *terms* of our presence. Are we able to see what we do? For if execution, as Lesser argues, is murder, than aren't we the murderers? The death of a condemned person through capital punishment is in no sense just his own death. And the

146. Gatrell, 601.
147. Lesser, 134.
148. Foucault, *Discipline and Punish*, 46.
149. Lesser, 40.
150. Ibid., 42.
151. As Turner and Brinkmann argue, "Squeamishness about whether it is 'in good taste' to put executions on television . . . is not an appropriate judgment for prison officials (or courts) to make." Turner and Brinkmann, "Televising Executions," 1161.

question of whether executions should be televised is more than just a question of manners. The failure to televise executions which are done in our name implies a radical (and false) separation between the practices of representative democracy and the ways those practices are, in turn, re-presented to us.[152]

Control over vision is a question of control over execution itself. This was, not coincidentally, the primary argument made by the state in *KQED v. Vasquez*.[153] The state argued that executions are properly just bureaucratic events which must be left in the hands of the professionals. Excluding television is but one way of maintaining control. As Foucault reminds us, the decline of public executions was the result not of humanistic movements or the dawn of a new sensibility, but of a reconfiguration of power relations involving punishment.[154] Modern power fosters and regulates life through a multiplicity of local institutions and everyday practices, rather than threatening death in spectacular but sporadic displays.[155] In a society which has replaced public punishment and torture with the penitentiary, execution appears anachronistic, a practice to which the state has an apprehensive, uneasy relationship. As Foucault wrote:

> As soon as power gave itself the function of administering life, its reason for being and the logic of its exercise—and not the wakening of humanitarian feelings—made it more and more difficult to apply the death penalty. How could power exercise its highest prerogatives by putting people to death, when its main role was to ensure, sustain, and multiply life, to put this life in order? For such a power, execution was at the same time a limit, a scandal, and a contradiction.[156]

Maintaining capital punishment in the face of this "limit," "scandal," and "contradiction" has required dramatic changes in its form. To survive, it had to be transformed from a public to a hidden affair, from an affair of politics to a matter of administration. The visual field onto which it would be projected had to be circumscribed. Opposing this circumscription of vision may be, as Lesser would have it, an exercise in bad manners. But it is also a resistance to execution itself.

The solidity and impenetrability of the prison wall creates a space where the killing of a person may be explained and justified by

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152. On the connection between meanings of representation, see Anne Norton, *Republic of Signs: Liberal Theory and American Popular Culture* (Chicago: Univ. of Chicago Press, 1993).
153. See Lesser, chapter 2.
154. See Foucault, *Discipline and Punish*, 50.
155. See Michel Foucault, *An Introduction*, vol. 1 of *The History of Sexuality*, trans. Robert Hurley (New York: Vintage Books, 1980), 133-59.
156. Ibid., 138.

reference to procedural safeguards, due process and super due process, theories of retribution, claims of just deserts, and stories of the criminal's dangerousness and brutality. These legitimating gestures are particularly crucial for the imposition of the death penalty, since execution, even execution by lethal injection, seems rudely out of place in our modern system of power—a throwback to earlier, more savage times. At the point of execution, law's violence and extralegal violence asymptotically approach one another. Televising execution would mean changing the terms of control, removing execution from the bureaucratic domain, and recognizing its political configuration.

IV. CONCLUSION

Pictures at an Execution provides a bracing and powerful reminder of the place of murder and capital punishment in the popular imagination. In so doing it makes an important contribution to the jurisprudential effort to chart the boundaries between law's violence and violence outside the law. Lesser's book illustrates the instability of that boundary and so warns us that the legitimacy of law is imperiled whenever law's violence is unnecessary, excessive, and murderous. It also serves us well by trying to stimulate our imagination of murder and capital punishment. This effort is one of the great strengths of the book. Yet it is a mistake for Lesser to use this aspiration itself as an argument against televising executions or to ground that argument in questions of manners, decorum, and taste.

The legal prohibition of televised executions goes well beyond issues of decorum and is rooted in a set of beliefs about the political threat of particular types of representation, beliefs which sustain the very possibility of capital punishment. Barring the camera and eliminating the public audience are ways in which law tries to purify execution, creating a nonpleasurable, nonsadistic, administrative killing. At stake in the debate about televising executions is something more fundamental than manners or its effects on the partisan debate about the pros and cons of capital punishment. At stake is the question of who will control the deployment of law's lethal violence. The inarticulate fear that fuels the prohibition of televising executions arises from the fact that controlling visual representation is essential to the bureaucratic control of execution in the modern economy of power. Thus if television is to be kept out of the death chamber, we must be clear that it is not a worry about bad taste that merits or explains the exclusion.

The drama of capital punishment, the battle between sovereign and criminal that animated public executions, is intentionally displaced in

the modern, bureaucratic form with its intense policing of the prerogatives of viewing. While public execution made it possible for the public to protest the state's deed of killing, bureaucratization smooths the way from the judge's authorizing words to the carrying out of the violent act. The uncontrollability of the gaze and the indeterminacy of its political effects are what make televising execu-tions so threatening to the survival of capital punishment. While tele-vising executions alone would not subject the state to the risk of pop-ular protest, it would end the bureaucratic concealment of those acts.

It is, in part, the elision of the visual that allows law's violence to seem different from violence outside of law. The prison wall displaces the referent of capital punishment. In banning the visual from representations of the death penalty, law has silenced one particularly powerful avenue for generating alternative interpretations of execution and provided a safe space for its own legitimating narratives. The camera threatens to render the prison wall transparent, revealing the object which the law has tried to obscure. The image exerts a special power on its viewer. "Photography's inimitable feature," Barthes writes, "is that someone has seen the referent . . . in flesh and blood, or again in person."[157] "The photograph," he continues, "is literally an emanation of the referent. From a real body, which was there, proceed radiations which ultimately touch me, who am here."[158] As a result, "The image has great power over us: it is often feared, avoided, hidden."[159]

The power of film and photography is precisely in its seeming transparency, its appearance as fact rather than interpretation. But the transparency is always only "seeming" and its appearance as fact is only "appearance." As Avital Ronell puts it, "precisely because the trauma is hidden from televised view . . . it is accessible only by reading. The spectral trauma remains hidden even to the hidden camera that blindly captures it."[160] Rather than presenting us with death stripped to its essentials, however, the camera threatens to reunite sadism, spectatorship, and popular power explicitly displayed in the executions of the ancient regimes. Televising executions can destabilize the boundaries between law's violence and the violence to which law is opposed, and can disrupt the effort of modern law to make us forget that we are killing. As Jef Richards and R. Bruce Easter argue, "Clearly televised coverage of executions may create

157. Roland Barthes, *Camera Lucida: Reflections on Photography*, trans. Richard Howard (New York: Hill & Wang, 1981), 79.
158. Ibid., 80.
159. Kate Millett, *The Politics of Cruelty: An Essay on the Literature of Political Imprisonment* (New York: W. W. Norton, 1994), 153.
160. Ronell, *Finitude's Score*, 324.

feelings of unrest and anger in some viewers. In so doing, however, these broadcasts probably will promote debate on an issue of high public importance—the death penalty. Thus, the public debate that television access likely will cause is precisely the reason that the government must allow it."[161] The camera's images would blur the distinction between execution and murder that *Pictures at an Execution* seeks to challenge.[162]

Televising executions would unsettle law's attempt to dignify the death penalty and to reduce it from a political spectacle to a matter of mere administration.[163] Even in the secrecy of the execution chamber, however, death cannot be sanitized or purified. In executing, the state manifests, even if only to the executioner, its dark desire to see a person die.[164] As Foucault says, "In modern justice and on the part of those who dispense it there is a shame in punishing, which does not always preclude zeal."[165] Making this shame and this zeal visible to a mass audience would as likely reveal the sadism that is at the heart of the state's tenacious attachment to capital punishment as invite the "bad taste" of its viewers.[166] In our view, the possibility of the former is well worth the risk of the latter.

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161. Richards and Easter, "Televising Executions," 417.

162. Van den Haag argues that "because televised executions would focus on the physical aspects of the punishment rather than the nature of the crime and the suffering of the victim, a televised execution would present the murderer as the victim of the state. Far from communicating the moral significance of the execution, television would shift the focus to the pitiable fear of the murderer." Van den Haag, "The Ultimate Punishment," 1667 n. 22.

163. See George Bishop, *Executions: The Legal Ways of Death* (Los Angeles: Sherbourne Press, 1965), 55.

164. "[I]s the executioner—even a state employee—a member of the public whom the state permits to manifest a dark wish to see another person die?" Steven A. Blum, "Public Executions," *Hastings Constitutional Law Quarterly* 19 (1992): 455.

165. Foucault, *Discipline and Punish*, 10.

166. We must ask whether or not the state's permission to take pictures at an execution signifies and invites an unruly and gratuitous pleasure, a pleasure whose governance and control would exceed bureaucratic prowess. For a possible answer, see Susanne Kappeler, *The Pornography of Representation* (Minneapolis: Univ. of Minnesota Press, 1986) (describing possible linkage between visual reproduction and sadism).

In explicating the meaning of photographs taken during a murder carried out in 1984 in Namibia, in which a white farmer, van Rooyen, tortured and killed Thomas Kasire, a new black worker on his farm, and in which during the course of the crime van Rooyen and his friends took pictures of Kasire's torture, Kappeler writes: "In the murdering of Thomas Kasire, taking pictures was an integral part of the act of torture and an integral part of the enjoyment of the act of torture. This particular form of violence has two parts: doing it and enjoying it, action and appreciation. Today, we loosely call it sadism." Ibid.

Kappeler imagines two crimes: the illegitimate killing of Kasire and the production of photographs of the event. For Kappeler, the photographs signify more than the occurrence of a murder; they are not merely a "mirror reflection of reality." Instead, the representation of violence is itself a form of violence which has continuing existence in world. The taking of pictures marks the murderer's lust as he fashions a world of fantasy out of the real, crafting signs to memorialize and celebrate the gruesome event. "Gratuitousness is the mark of the murderer's photography. It is for sheer surplus pleasure . . . It serves the leisure and the pleasure of the white man . . . It is a form of his free expression of himself, an assertion of his subjectivity."